

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ALLEN KOERSCHNER,

*Petitioner,*

vs.

MICHAEL BUDGE, *et al.*,

*Respondents.*

3:05-cv-00587-ECR-VPC

ORDER

This habeas matter comes before the Court on respondents' motion (#114) for reconsideration of the Court's denial of respondents motion to dismiss Grounds 1, 6, 7 and 8(A) on the basis of procedural default.

In considering respondents' motion to dismiss in its earlier order, the Court *sua sponte* revisited its prior determination that the identified grounds had not been exhausted prior to the stay. The Court concluded that the claims were exhausted under the Ninth Circuit's intervening decision in *Chambers v. McDaniel*, 549 F.3d 1191 (9<sup>th</sup> Cir. 2008).

Under the facts presented in *Chambers*, the Supreme Court of Nevada had issued an order denying claims presented in an extraordinary writ petition filed in that case on the following grounds:

This is a proper petition for an extraordinary writ. Petitioner challenges the validity of his judgment of conviction and sentence. We have considered the petition on file herein, and we are not satisfied that this court's intervention by way of extraordinary relief is warranted at this time. Accordingly, we

1 Order the petition DENIED.[FN1]

2 [FN1] We have considered all proper  
3 person documents filed or received in this  
4 matter, and we conclude that the relief  
requested is not warranted.

5 See 549 F.3d at 1196; #114, Ex. A. The Ninth Circuit held that the use of the language in this  
6 order constituted a disposition in the merits, exhausting the claims in the extraordinary  
7 petition. 549 F.3d at 1196-99.

8 In the present case, the Supreme Court of Nevada rejected petitioner's original writ in  
9 that court on the following grounds:

10 This is a proper person petition for a writ of habeas corpus  
11 in which petitioner challenges the validity of his judgment of  
12 conviction. We have considered the petition on file herein, and  
13 we are not satisfied that this court's intervention by way of  
14 extraordinary relief is warranted. A challenge to the validity of a  
judgment of conviction should be raised in a post-conviction  
petition for a writ of habeas corpus filed in the district court in the  
first instance.[FN1] Petitioner may appeal from a final, adverse  
decision on the petition.[FN2] Accordingly, we

15 ORDER the petitioner DENIED.[FN3]

16 [FN1] See NRS 34.724; NRS 34.738(1). We  
17 express no opinion as to whether petitioner  
18 could satisfy the procedural requirements of  
NRS chapter 34.

19 [FN2] See NRS 34.575(1).

20 [FN3] We have received the proper person  
21 documents submitted in this matter, and we  
conclude that no relief is warranted for the  
reason set forth above.

22 #70, Ex. 108.

23 Respondents' motion for reconsideration is premised upon the variances in language  
24 between the order in *Chambers* and the order in the present case. The Court is not  
25 persuaded.

26 In the prior order, the Court focused on the key language under *Chambers*:

27 In *Chambers*, the Ninth Circuit held that the Supreme  
28 Court of Nevada had rejected an original petition on the merits  
and that the claims therein thus were exhausted. The Ninth

1 Circuit held that the state supreme court's order constituted a  
2 disposition on the merits because the state high court stated in  
3 the body of the order that "[w]e have considered the petition on  
4 file herein, and we are not satisfied that this court's intervention  
5 by way of extraordinary relief is warranted at this time." In  
6 addition, the state high court stated in a footnote that "[w]e have  
7 considered all proper person documents filed or received in this  
8 matter, and we conclude that the relief requested is not  
9 warranted." 549 F.3d at 1195-99.

10 In the present case, the Supreme Court of Nevada used  
11 nearly identical language in the body of its order rejecting  
12 petitioner's original petition, stating: "We have considered the  
13 petition on file herein, and we are not satisfied that this court's  
14 intervention by way of extraordinary relief is warranted." And the  
15 state high court used virtually identical language in a footnote,  
16 stating: "We have received the proper person documents filed  
17 or received in this matter, and we conclude that no relief is  
18 warranted for the reason set forth above."

19 There would appear to be no difference of material  
20 substance between the language used by the Supreme Court of  
21 Nevada in the order considered in *Chambers* and that used in the  
22 order in the present case. Accordingly, under *Chambers*, the  
23 claims presented in the original petition are exhausted. . . .

24 #113, at 4 (record citation footnote omitted).

25 The distinctions relied upon by respondents in the language used in the present case  
26 are not material. The key point is that the state supreme court stated that it had considered  
27 the petition and had determined that extraordinary relief was not warranted, stating its  
28 conclusion again in the footnote that relief was not warranted. Under *Chambers*, any  
ambiguity in the state court's order must be construed against a construction that the  
disposition was on procedural grounds rather than the merits. 549 F.3d at 1197.

29 The state supreme court's reference to the normal avenues for state post-conviction  
30 relief does not remove all ambiguity and establish that the denial instead was on purely  
31 procedural grounds. *Chambers* does not hold, as respondents maintain in their reply  
32 memorandum, that mere citation to a procedural statute, in and of itself, demonstrates a clear  
33 and unambiguous invocation of a state procedural disposition. Rather, citation to a  
34 procedural statute in a "postcard denial" order that states simply that a petition is "denied,"  
35 rather than is "considered," demonstrates that the dismissal is on procedural grounds. See  
36 549 F.3d at 1197-98.

1 The Court further is not persuaded that it should find that the disposition was on  
2 procedural grounds because the claims in the state court petition allegedly raised factual  
3 issues and required resort to record materials that were not attached with the petition. The  
4 *Chambers* panel referred to the fact that only a jury charge issue was raised in the petition  
5 there in further distinguishing the case from a prior order in *Hosier v. State*, 121 Nev. 409, 117  
6 P.3d 212 (2005). The Court is not persuaded that the presence or absence of purely legal  
7 issues and/or the presentation of all necessary record materials with the petition have  
8 controlling significance under the analysis in *Chambers*. See 549 F.3d at 1198-99.

9 Finally, to the extent that respondents urge that *Chambers* represents a deviation from  
10 prior established United States Supreme Court, Ninth Circuit, and Supreme Court of Nevada  
11 case law, respondents will have to take that issue up with the Ninth Circuit or the United  
12 States Supreme Court. The Court notes that no petition for a writ of *certiorari* was filed in  
13 *Chambers*. This Court is bound to follow the controlling and apposite Ninth Circuit authority  
14 in *Chambers*.

15 IT THEREFORE IS ORDERED that respondents' motion (#114) for reconsideration  
16 is DENIED.

17 The Court will reach the claims remaining, on the papers presently on file, as promptly  
18 as its docket permits.

19 DATED: October 3, 2011.

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22 EDWARD C. REED  
23 United States District Judge  
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